United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1914

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

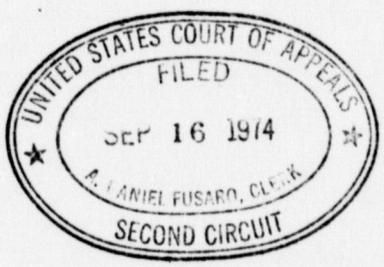
RUSSEL DICKERSON,

Appellant.

Docket No. 74-1914

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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1

TABLE OF CONTENTS

Table of Cases and Other Authorities ii

Questions Presented 1

Statement Pursuant to Rule 28(3)

Preliminary Statement 2

Statement of Facts 2

Argument

I The court improperly permitted the jury to find appellant guilty on a theory of vicarious liability 12

A. The failure to instruct on larceny 12

B. The inapplicability of United States v. Alsondo 14

C. Pinkerton v. United States would have been inappropriate here 17

D. Reversal is required 20

II The modified Allen charge misstated the normal expectation of an accused and prejudiced appellant 21

Conclusion 22

UNITED STATES COURT OF APPEALS
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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether it was error to permit the jury to premise its verdict of guilty upon a theory of vicarious liability.

2. Whether the modified Allen charge so misrepresented the defendant's normal expectation as to be unfair.

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (the Honorable Charles L. Brieant) rendered on June 20, 1974 convicting appellant of assaulting a federal officer and sentencing him to two years in prison.

The Legal Aid Society Federal Defender Services Unit was assigned as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

The appellant and Julius Sykes were indicted for assaulting a federal officer. The third alleged participant, Moses Young, was charged with the same crime in a separate indictment (73 Cr. 812). Appellant was tried alone, while Sykes was permitted to participate in a drug rehabilitation program. Young was acquitted on March 14, 1974 after his trial.

At appellant's trial, Agent Frank Balasz testified that in the course of an undercover narcotics investigation begun in June, 1973 (25-6), he had received from Bob Barry a quantity of cocaine and nine hand guns. On July 27, 1973, Balasz and Agent Carroll, dressed as hippies (56) and working in their undercover capacity (57), met with Barry at Venable's Vegetable stand and discussed the purchase of a sawed-off shot gun (28) and delivery of cocaine (29). As Balasz was leaving, appellant approached and asked Balasz if he wanted

to buy cocaine or heroin (30). Appellant also said he could supply hand guns, machine guns, and shotguns (31). Balasz expressed interest in a machine gun and appellant stated one with two loaded magazines could be supplied for $500 (31-32). Appellant also stated he could get pistols for $75 each (32).

Appellant left the market and the area (33). Balasz waited near the fruit market and, in the interim, reported to the police radio operator what had occurred (33).

When Balasz returned to the fruit stand, appellant, Moses Young and Julius Sykes were sitting on the hood of a car. Carroll was parked nearby (34). Appellant told Balasz that the gun was in the back seat of the car. Appellant and Balasz got into the back seat of the car (35) and appellant handed Balasz the gun and showed him a magazine (35). The gun, an M1 carbine (35), with a partially defaced serial number (36), and the magazines were introduced into evidence (35-6, 39).

Balasz then counted out $500 and put it on the floor of the car, in front of him (39, 40).

Balasz then got the gun back from appellant.* Balasz observed that it did not appear to be working properly (40). He handed the gun to Sykes, who by then was sitting in the front passenger seat of the car (41). Young was in

*Notwithstanding this testimony, the record does not show that Balasz gave the gun to appellant.

the drivers seat. Balasz tried to get the price lowered; Appellant asked Young who said no (41). Agent Carroll approached in his car and double parked but was told to leave since Young and appellant felt he would attract the police (42). Appellant then put the $500 into his pocket and left the car (43).

Balasz told Sykes and Young he was taking the gun and going to leave (43). Sykes pointed the loaded gun at Balasz (43). Balasz left the car, followed appellant around the car and asked appellant on two instances either for the gun or the money (43). Appellant at first ignored Balasz and then told him he did not have the money (44). Balasz opened the car door at the front passenger seat to take the gun from Sykes and Sykes struck him with his elbow (44). Young had gotten out of the car and was on the sidewalk. Young threw the keys to appellant who ran around the car and tried to get in at the driver's seat (45). Balasz attempted to stop appellant from getting in (45, 61) and as appellant tried to open the door, Balasz tried to close it (46). Appellant pulled the door against Balasz, tried to kick Balasz but missed and then hit Balasz in the left shoulder.

Young grabbed Balasz from behind (47). Both Young and appellant struck Balasz (47). At this point (63) Balasz announced he was a police officer and tried to draw

his gun (47). As Young and appellant continued hitting Balasz, his gun fell to the ground. Young ran; appellant dropped the money and also ran (47-8). As he threw the money, appellant stated he did not know Balasz was a policeman and several times stated that if he had known, nothing of the sort would have happened (49).

The testimony of Agent Lehan, conducting surveillance nearby, was that he saw appellant and another man (later identified as Young (72)) in a fight with Balasz (70). Lehan arrested Sykes in the car (81).

Douglas Ross, the supervising agent, related that Balasz and appellant, Young and Sykes got into the car used by the three; that after a few minutes, one man, later identified as appellant, got out followed by Balasz who ran after appellant. Ross saw a scuffle between Balasz and appellant (97) but could not be specific as to what occurred (116). One of the men grabbed Balasz and pushed him against the car. Ross could not identify the person who pushed Balasz (96) nor did he see anything else (97). As Ross and Lehan got to the scene, the fight ended (99, 118).

Appellant testified on his own behalf. He stated that around one or two o'clock, appellant left his mother's house, and was walking down the street when a Robert Berry

called him into his vegetable store. Inside the store at the time were two men, who, unknown to appellant were agents Balasz and Carroll (141). Berry asked appellant to get him some drugs. Appellant said he could not get any. Berry then asked about guns. Appellant said he knew someone who had a gun and would try to reach him (126). Appellant left the store and thereafter met Moses Young, who was with Julius Sykes (140), told Young someone wanted to buy his gun, and drove with Young to pick up the gun. Young put the gun in the car (127) and then they returned to Berry's store (127).

Appellant and Young were leaning on the car door and Sykes was inside the car when Balasz returned and approached them (128). Balasz inquired of appellant where the gun was and appellant pointed to the floor of the back of the car. Balasz and appellant got into the car (128); Young sat in the drivers seat (130). Appellant said he thought the gun cost $500.00 (147). Balasz picked up the gun, examined it and asked how it worked. Appellant told him to ask Young about that. Young took the gun; he gave it to Sykes. Balasz counted out $500.00 and put it on the floor of the car (129). Appellant picked up money and tried to give it to Young (129), who by then had gotten out of the car (130, 149). Balasz then left the car and he and Young talked on the street.

Appellant tried twice to give Young the money, but he wouldn't take it (131). As appellant tried to re-enter the car to drive away (131), Balasz closed the door on his hand (131). A scuffle ensued between Young and Balasz (134). Appellant got into car (134) and Agent Carroll (132) approached with his gun drawn and pointed at the windshield. Appellant got out of the car (13) and was attacked by Balasz (132). Thinking Balasz was a thief (133, 134) appellant gave the money to Balasz (132-133) and then walked away (133). As he got across the street, someone ran up behind him, grabbed him, pushed him, and handcuffed him. Appellant denied striking Balasz (135).

Balasz was called in rebuttal to testify to a statement given by appellant to government agents after his arrest. In the statement, appellant allegedly admitted negotiated for the sale of guns for $500 (181).

At the close of the case, the Judge discussed with counsel the contents of the charge he would give to the jurors. He declined to give any charge on self defense because the issue was not raised by the defense (191, 195). He stated he would give an instruction on joint venture:

> ....That is that the defendant Dickerson, acting jointly or as partner with Moses Young and Julius Sykes, was engaged in a criminal venture, words used during the trial, to rip off Balasz and Carroll by taking

their money for the sale of a gun and ammunition and keeping both the money and the gun. That would be larceny and anybody who does that knowingly and willfully would be engaged in a criminal venture.

191-192

* * *

... the defendant knowingly and willfully became and was at the time of the assault a member of the venture.

You have to be a member of it at the time the assault was committed by Young.

194

* * *

It is contended even by Dickerson that somebody struck Balasz and it happened to be Young.

Now if the jury finds that at the time Young struck Balasz, if he did, that Young, Sykes and Dickerson were engaged in a state law criminal conspiracy or joint venture or undertaking to commit larceny against the two hippies, who later turned out to be agents, then the acts of Young in beating on Balasz, if he did, are the acts of Dickerson under principals of agency and that is all there is to it.

198

Counsel objected to this proposed charge because it advised the jury that the appellant might be involved in a conspiracy not charged in the indictment (198).

In the course of this summation, the Assistant United States Attorney stated:

> The Government contends and I believe that the Court will charge you that if you find that the defendant and Moses Young and Julius Sykes were acting together in a joint venture to commit a larceny in this case, to keep both the gun and the money, and in the course of that an assault was committed upon the agent of the Drug Enforcement Administration, Agent Balasz, that regardless of who committed the assault you must find the defendant guilty of the charge of assaulting a federal officer.
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> 217

In the charge, the Judge stated:

> ...in considering his guilt or innocence, you may have to determine the nature of the participation, if any, of Moses Young, Julius Sykes or the others.
>
> 231
>
> * * *
>
> ...the Government relies on another separate additional and perhaps different theory of law in this case, entirely separate and independent of the statute about which I have just instructed you. It contends that the defendant is guilty of the substantive offense charged in the indictment. Even if he personally did not assault Special Agent Balasz because, they contend, the assault was committed in furtherance of and during the course of an unlawful criminal venture of which the defendant was a member.

The Government further contends that the object of the criminal venture was larceny by trick, false pretense, false promise or other means in violation of the laws of the State of New York, that is, that the defendant Dickerson, acting jointly or as partner with Moses Young and Julius Sykes, was engaged in a criminal venture. That is, that they intended, after taking the money of Balasz and Carroll for the sale of a gun and ammunition, to keep both the money and the gun. If this was their intention, that would be larceny and anybody who does such a thing knowingly and willfully would be engaged in a criminal venture.

Now, a joint criminal venturer is liable for the acts and statements of his co-venturers, provided they were made within the scope of the unlawful agreement, as he saw it, during the pendency of the venture and in furtherance of its objectives and while this defendant was a party to this illegal scheme.

To find the defendant guilty of the crime charged under this alternative theory, you must find beyond a reasonable doubt, first, that another person, in this case Moses Young or Julius Sykes, committed the assault charged and was a member of the illicit criminal venture.

Second, that the defendant knowingly and willfully became and was at the time of the assault a member of the venture.

And third, that the assault was committed in furtherance of the venture or its object.

240-242

As to knowledge, the court charged:

> Now, to prove the offense here charged, the Government is not required to prove that the defendant Russell Dickerson knew Mr. Balasz or even that he knew Mr. Balasz was a federal employee. It is no defense that the defendant did not know Mr. Balasz was a federal employee.
>
> 239

At the conclusion of the charge, counsel objected to the joint venture theory as prejudicial because it introduced into the case the additional uncharged crime of conspiracy to commit larceny. The Judge refused to modify the charge (252).

The jury deliberated on the day the charge was given, and the next two days (257-261). At the beginning of the third day, the Court gave a modified Allen charge, including the statement that the Judge was sure that the appellant would want the matter resolved one way or the other (265). Thereafter, the jury reached its verdict of guilty.

ARGUMENT

POINT I

THE COURT IMPROPERLY PERMITTED THE JURY TO FIND THE APPELLANT GUILTY ON A THEORY OF VICARIOUS LIABILITY.

Premised on the appellant's testimony that it was Moses Young and not himself who struck Balasz, the Court, in accord with the Government's request to charge, instructed the jurors that appellant might be guilty of the assault on a theory of vicarious liability.* The jurors were told that if appellant was engaged with Young and Sykes in the commission of a larceny by keeping the gun and the money, and if the agent was struck by Young in the course of that venture, that appellant was guilty of assault.

The charge improperly removed a key element of the theory from the jury's consideration, and it improperly applied United States v. Alsondo, 486 F.2d 1339, 1346 (2d Cir. 1974), cert. granted, sub nom. 42 U.S.L.W. 3504 (Sup. Ct. April 14, 1974).

A. The Failure to Instruct on Larceny.

Judge Brieant told the jurors it was the Government's theory that appellant, Young and Sykes were engaged in a lar-

*This was an alternative to the theory that appellant was guilty because he struck Balasz.

ceny by trick, false pretenses, or false promises or "other means" in violation of New York law. To explain to the jurors how to apply that theory of guilt, he said that if appellant and the others intended to keep both the gun and the money, they were engaged in a larceny. He continued by saying that if appellant and the others were members of the venture and the assault was in furtherance of the venture, appellant could be guilty of the assault.

The judge then outlined the elements necessary to find guilt under this theory:

> [You must find] first, that another person, in this case Moses Young or Julius Sykes, committed the assault charged and was a member of the illicit criminal venture.
>
> Second, that the defendant knowingly and willfully became and was at the time of the assault a member of the venture.
>
> And third, that the assault was committed in furtherance of the venture or its object.
>
> 240-242.

In the explanation of each element, he assumed the commission of the larceny. There was no instruction that the jurors had to make the determination as to whether the larceny had occurred, and they were not advised of the elements of the

crime under New York Law. See McKinney's, New York Penal Law §§155.00 et seq. Thus, a key element of the theory upon which guilt was to be based was removed from the jury's consideration. This is substantial error. United States v. Screws, 325 U.S. 91 (1945); United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Fields, 466 F.2d 119 (2d Cir. 1972).

B. The Inapplicability of United States v. Alsondo

In the opinion on rehearing in United States v. Alsondo, supra, 486 F.2d at 1346, this Court determined that a defendant was properly found guilty of the substantive crime of assault on a federal officer on a theory of vicarious liability. The guilt was premised on the existence of an underlying conspiracy to obtain a drug purchaser's money* by fraud or force.** This Court concluded that those defendants who did not participate in an ensuing assault on the agents were nonetheless guilty of assault when one of the defendants drew a gun against the agent-purchasers because the underlying venture contemplated the use of force if the fraud failed (United States v. Alsondo, supra, 486 F.2d at 1346, n.5). All were guilty of the assault because, said this Court, they "were part of a plot to commit the crime that actually occurred." Id. at 1347.

*The purchasers were agents who were to buy drugs from the defendants. The substance to be sold was in fact sugar.

**The defendants were armed, and it was the Government's theory that if the fraud was unsuccessful the defendants planned to take the money by force.

Here, there was no evidence that any force was ever contemplated by the defendants. According to Agent Balasz himself, he believed, after having purchased a weapon from the defendants, that the weapon was either defective or not to his specifications. He gave the gun to Sykes, inquiring as to how it worked, and shortly after asked for the return of the gun. Sykes pointed the gun at Balasz but, undeterred, Balasz demanded the gun or the money, and tried to take the gun from Sykes.* In response to Balasz' demand, appellant said he did not have the money.

Appellant's next act had nothing to do with Balasz, but rather was an attempt to get into the car. It was Balasz' response to appellant's attempt to enter the car that resulted in the first physically threatening act -- Balasz tried to close the car door as appellant was opening it.**

According to appellant's testimony, which the jury was instructed it could consider in evaluating the alternative theory of guilt, Balasz closed the car door on appellant's

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*The Government never asserted that pointing the gun at Balasz was the assault. In fact, in the discussion between the Court and the Government as to whose conduct resulted in the assault, the Government never suggested the gun pointing and the Court rejected the contention that the assaultive conduct occurred when Sykes' elbow hit Balasz as Balasz attempted to grab the gun. Further, Balasz' conduct indicated he did not believe he was being assaulted at this point.

**This cannot be called resisting arrest since Balasz stated he did not announce his identity until later.

hand,* and then Young and Balasz "scuffled."

All of these evidence shows that in the best light for the Government, the assault occured after the alleged larceny was completed; at worst, in the eyes of the jury, the agent was the aggressor.**

Even the judge must have recognized that the record did not support a charge that the underlying joint venture was a crime involving force. He chose to define the transaction as a larceny by fraud. The concept of larceny precludes presence of force or violence or the threat of either. The presence of these factors converts the conduct to a robbery. Clark and Marshall, On Crimes, 798, 881 (7th ed. 1967). Indeed, even "compound" larceny is a taking from the person of another but without violence or putting in fear (Id. at 874). Larceny even excludes the presence of force or fear after the larceny is completed. Clark and Marshall, On Crimes, supra, §§12.13, 12.14 at 891. To contrast robbery and larceny, one commentator has said:

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*On this testimony the judge was obliged to have instructed the jury to consider whether Young was coming to the aid of appellant, whether Young knew Balasz was an agent, and whether the force used was excessive. United States v. Ulan, 421 F.2d 787 (2d Cir. 1970); United States v. McKensie, 403 F.2d 983 (2d Cir. 1969); United States v. Heliczer, 372 F.2d 241, 248-49 (2d Cir.), cert. denied, 388 U.S. 917 (1967). If Young's conduct was properly the defense of a third person, no criminal assault occurred.

**The general principle that the case is viewed most favorably to the Government does not apply in discussing this issue since the question is whether the charge was proper on the evidence as presented.

> Robbery requires that the taking be done by means of violence or intimidation. Larceny from the person or presence of the victim is not robbery without this added element of force or fear.
>
> La Fave and Scott, Criminal Law, 696 (West, 1972).

Thus, it is clear that whatever joint venture took place between appellant and his friends, the assault was not a part of it.

Under Alsondo, the vicarious liability is imposed only if the act carried out was the specific act agreed upon. The Alsondo theory of liability is properly limited to the specific act agreed upon. Without this limit, an accused could be held criminally liable when he did not participate in the criminal conduct or have the intent and knowledge that the act be carried out. The assault here, as a matter of law and fact, was not the subject of the joint venture.

C. Pinkerton v. United States Would Have Been Inappropriate Here

Since this case does not properly come within Alsondo, the only remaining justification for the charge on vicarious liability could have been Pinkerton v. United States, 328 U.S. 640 (1946). Under Pinkerton, a co-conspirator is guilty of the reasonably foreseeable substantive crimes committed in

Balasz a weapon but did not contemplate an assault for the scuffle arose only after Balasz tried to stop appellant from getting into the car. To all appearances, Balasz' conduct at the car was a suprise. The defendants did not know the identity of Balasz* and they believed they were dealing with one** unarmed person. Under the these circumstances they had no reason to believe that Balasz would seek return of the gun or his money.

Further, the assault was not in furtherance of the joint venture. As previously noted, the main purpose of the joint venture, as defined by the Court,*** ended when the defendants possessed the money and the gun. Thus, whatever occurred thereafter, could not have been in furtherance of the transaction because the transaction was completed. As part of an attempt to leave the scene, or conceal the events the scuffle was a separate and distinct act. Grunewald v. United States, 353 U.S. 391, 399 (1957); Krulewitch v. United States, 336 U.S. 440, 442-3 (1949).

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*The Government's own testimony was that the agents were dressed as hippies, were working undercover and did their best to hide their identities. Appellant said both at the time of his arrest and in Court that he did not know they were agents. While the jury was told that this issue need not be resolved, there is no evidence on the record that the identities of the agents were known.

**Carroll, the second undercover agent, was nearby in a car but had left the group at the defendant's request.

***The record supports the conclusion that the judge overstated the scope of the transaction. It appears that initially, the "larcenous" transaction involved only the failure of the defendants to supply the type of gun that Balasz ordered.

furtherance of a conspiracy.

However, here there was no Pinkerton charge requested by the Government, and any Pinkerton language was inappropriate. Nye & Nissen v. United States, 336 U.S. 613, 619-20 (1949). Pinkerton applies only "where the conspiracy was one to commit offenses of the character described in the substantive counts." Nye & Nissen v. United States, supra, 336 U.S. at 619-20. Here the joint venture was larceny. For the reasons discussed in part B, supra, assault is not an offense related to the larceny, either factually or legally. What is more, the joint venture here is a state law crime not chargeable in the federal indictment. In no case has the Government created vicarious liability under Pinkerton premised on conduct which federal authorities have no authority to regulate.

Further, even if Pinkerton were appropriate, there was no instruction to the jury on the question of forseeability. The judge simply charged that the jury had to find that the assault was performed by a joint venturer in furtherance of the conspiracy. The jury thus did not make any finding on the issue of forseeability -- a critical issue under Pinkerton.

The record in this case also shows that there was no proof of "forseeability" or that the assault was committed in furtherance of the agreement to commit a larceny. The evidence showed that the three defendants came unarmed to sell

D. Reversal Is Required

Since the alternative theory of guilt premised on vicarious liability was improperly presented to the jury, the conviction must be reversed. Leary v. United States, 395 U.S. 6, 31-32 (1969); United States v. Rodriguez, 465 F.2d 5 (2d Cir. 1972).* The jurors had difficulty resolving the issues, for they deliberated for three days. Whether they chose to rely on the theory that appellant directly participated in the assault is unknown, although the length of the deliberations indicates that they might have been wrestling with the vicarious liability theory.

Further, counsel objected to the theory of vicarious liability, arguing that the introduction of a larceny charge into the case was prejudicial to appellant. The court rejected the theory and refused to modify the charge. The objection was properly taken because it advised the judge of the primary complaint with respect to his instruction, that the jury was told that appellant was involved in another crime. However, under Rule 52(b), a reversal is required. The jury was improperly advised that they could find guilt on a theory wholly inappropriate and improperly articulated.

The judgment must be reversed and a new trial granted.

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*In Alsondo, this Court held this principle not applicable because on either theory the critical finding of fact would have been the same.

Point II

THE MODIFIED ALLEN CHARGE MISSTATED THE NORMAL EXPECTATION OF AN ACCUSED AND PREJUDICED APPELLANT.

The jury began its deliberations on the day the charge was given, and the deliberations continued for three days. Finally, the judge gave a modified Allen charge, and included in his instruction a statement that he was sure the defendant would want the matter resolved.

While this Court has sustained a variety of Allen charges, including one that advised the jury that the cost in time and money of a new trial would make it desirable to reach a verdict (United States v. Hynes, 424 F.2d 754, 757 (2d Cir. 1970), cert. denied, 399 U.S. 933 (1971); United States v. Rao, 394 F.2d 354 (2d Cir. 1968), cert. denied, 393 U.S. 841 (19)), the statement made by the judge in this case was clearly contrary to the normal desires of most defendants. Whether or not it is a defendant's right to have a mistrial due to a hung jury, most defendants who deny their guilt and go to trial would rather have a mistrial and a second opportunity to put the Government to its burden than to be convicted. In this case, appellant might well have benefited from a latter proceeding because his comrade, Moses Young, was tried after appellant was and was acquitted. The record of the Young case could have provided an assistance

to appellant in challenging the credibility of Agent Balasz.

The judge's statement might well have injected into the jury's deliberations an element which solftened the resolve of those jurors who did not want to convict appellant. They may well have believed that appellant, more than wanting to avoid a guilty verdict, wanted a resolution. Such a premise is not generally true, and the judge could not properly assert it was true here since he never asked appellant his wishes.

CONCLUSION

For the above-stated reasons, the judgment of the district court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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September 16, 1974

Certificate of Service

Sept. 16, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

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